IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

MONDAY, THE 10TH DECEMBER 2007 / 19TH AGRAHAYANA 1929

CRL.A.No. 1478 of 2004()

SC.324/2003 of ADDL. SESSIONS COURT (ADHOC)-II, PALAKKAD
.....

APPELLANT: ACCUSED:

SOMASUNDARAN, S/O. KORAN,
PARAKALATHIL VEEDU, CHUDUVALATHUR, SHORNUR.

BY ADV. SRI.P.VIJAYA BHANU
SRI.P.M.RAFIQ

RESPONDENTS: COMPLAINANT:

STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR (SRI.K.C.SANTHOSH KUMAR)

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 10 /12 / 2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B. KOSHY & K. HEMA, JJ.

Crl. Appeal No.1478 of 2004

Dated this 10th day of December, 2007

JUDGMENT

Koshy,J:

The appellant was convicted and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.5000/- and in default of payment of fine to undergo simple imprisonment for 3 months for offence punishable under Section 302 IPC on the allegation of murdering his own brother. He was also convicted and sentenced to undergo rigorous imprisonment for 2 years under Section 324 IPC for inflicting grievous injuries on his father. The charge levelled against the accused by the court was as follows:

> "That you, the accused person on 7.12.01, at abut 17 hours at a place 9 metres south from the front side of your house bearing No.IX/464 of Shornur Municipality wherein you are residing with your family, on account of enmity between you and your brother in purchasing two cents of property by you from your father, with the knowledge and intention of causing the death of your brother, you inflicted a cut injury on the back side of his neck and he died and thereby you had

committed the offence punishable under Section 302 IPC.

That you, on the same day, time and place inflicted a cut injury on the right side of the forehead of your father when he tried to obstruct the attack on your brother and you the accused thereby committed the of fence punishable u/s.324 IPC."

2. For proving the above said charges, prosecution examined 15 witnesses out of which PWs 8 to 10 were alleged to be occurrence witnesses. No defence evidence was adduced by the accused. But in the statement under Section 313 Cr.P.C., the definite case of the accused was that on 7.2.01 at noon the deceased trespassed into the house with a chopper ( ) and tried to assault him, his wife and children. His father, PW8 came to the house and caught hold of the deceased and tried to take him out of the house and the deceased inflicted injury on the father. Irritated by this, father caught hold of the chopper and inflicted cut injuries on Mohan Kumar and thus Mohan Kumar died. Immediately, Municipal Councilor Sunil Kumar (CW4) came and he was informed about this. He was asked to report the matter to the police and when he went to the Police Station he was apprehended by the police and he stated that he was innocent. During the cross-examination of the occurrence

witnesses, the main endeavour of of the accused was to show that the injuries were occurred while he was exercising his right of private defence. Ext.P9 is the F.I. statement which was stated to have been given by PW8, father of the deceased. He was an injured witness. In the F.I. statement it is stated that while he was sitting in the house at about 4.45 p.m. along with his wife (PW9) and daughter Sunitha (PW10), his younger son Mohan Kumar (deceased), who was residing in Madras, came and then he went away stating that he is returning to Madras. Later he heard a sound from the house of Mohan Kumar . He along with his wife went there. At that time, he saw that the accused Somasundaram was inflicting injuries on Mohan Kumar by using a Madaval. When he interfered he also got injury with the Madaval. He cried aloud. People gathered there and he and his son were brought to hospital. It is stated that he gave 2 cents of land to the accused. Due to that there was frequent quarrel with his children and due to that enmity deceased was killed by the accused. He also stated that the incident occurred at about 5 p.m. In his examination there was slight variation from the evidence. He deposed that he saw accused inflicting cut injuries on the deceased. It was also stated that first cut injury was inflicted on

the forehead. Thereafter he as well as Mohan Kumar were pushed out and accused inflicted injuries on both persons. At that time his wife and daughter were also there. He was taken to the hospital by CW4 Sunil Kumar, who was Muncipal Councillor. By the time they reached the hospital, son died. He identified MO1 with difficulties. He also stated that he has not singed Ext.P9 statement (F.I. Statement). He further stated that he did not give any statement to the police. Statement was given to the police by his daughter, PW10. He was unable to state anything at that time even if he was not unconscious. He also stated that the incident was narrated to the doctor also by P10, the daughter. He stated as follows:

"

".

He also stated that when police again questioned him the second time in the hospital he said that he was not remembering at what time daughter had given the statement. He further stated that deceased came to his house after 3 p.m. and returned

stating that he was going to Madras. He also stated that in an earlier incident he was pushed down by the accused and when he fell down his leg was fractured. That incident was six years ago. On that incident there was quarrel between the deceased and accused. He also stated that he acquired 1 acre 9 cents of land out of which 2 cents were given to Anandan (PW11) and there was no dispute with regard to that. Later he stated that the above 2 cents of land was purchased by accused Somasundaram from Anandan. He was very definite that because of that there was no dispute between the other children. Therefore PW8 has stated that the alleged motive in the charge-sheet was not really a motive for the incident. He stated that when Mohan Kumar came to his house there was another person with him but he did not inform that matter to the police. He also did not say to the police regarding the selling of 2 cents of land to Anandan. He further stated that 2 cents of land is in the centre of his property. Apart from the above, another 5 cents of land was also given to the accused but there was no dispute regarding to that among the children for giving five cents of property to the accused and statement to the contrary are incorrect. He also stated that the distance between his residential house and the house of the

accused was only 15 ft. He further stated that when he came to the house deceased asked whether his brother was there. Thereafter, he went to the house of the accused and he felt some doubt on that at that time. He deposed as follows:

"

"

The suggestion that he pushed open the door by hitting with leg and pushed down the accused, his wife and child was denied. He also stated that he took the accused out of the house. According to him he went for seeing bride of accused but in the marriage neither his wife nor children participated. But on account of the marriage of accused there was no quarrel. He also stated that deceased Mohan Kumar was an accused for stabbing another person. He further stated that for the purpose of marriage of his daughter Sunitha (PW10) gold ornaments were requested from the wife of the accused but that was not given but for that there was no dispute between them. According to him, others gathered there only when he cried aloud. He was very definite that no neighbours were there at the time of incident and all of them came after the incident. The suggestion

again put forward was that he did not give any statement to the police and according to him what was given was by the daughter (PW10). In further chief examination he sated that, in Ext.P9, thumb impression was put by him but in further cross-examination he stated that he is not remembering whether he has given his thumb impression on the same. He used to sign decently by writing his name in the deposition recorded by the court he has put his signature.

3. PW9 is the wife of of PW8 and mother of accused and deceased. She also stated that Mohan Kumar came to their house on that day and enquired about accused and went to the house of the accused who is residing nearby. Thereafter, she heard voice from his house and she and her husband went there and they saw injured Mohan Kumar. The accused pushed down the deceased and again inflicted injuries by MO1 Madaval. Her husband was also injured. She also stated that she had not seen any earlier disputes between them. According to her, on getting information that the accused caused fracture to the leg of the father, deceased became angry and quarrel took place. In cross-examination, she sated that police questioned her twice and both times answer was given by daughter Sunitha (PW10). She

deposed as follows:

"

".

She also stated that she has told the police regarding the earlier incident of fracture in the leg of her husband by the accused but she cannot say why it was not recorded by the police. She also stated that after that only 2 months before the date of occurrence in this case, the other incident regarding pushing the father by the accused and fracture of leg occurred. After that for the first time deceased came to the house and on getting information she rushed to the house of the accused but police did not record the same. The said suggestion put forward on behalf of the accused that it was deceased who caused injury to PW8 etc. were denied by PW9. She also stated that Sathyan who was doing manual work in the house has seen the incident. (The said Sathyan was not examined). PW10 is the daughter. PW10 deposed that she saw the entire scene and she deposed in terms of the prosecution case but the trial court, which had occasion to

witness the demeanor of the witness, did not believe PW10 as the evidence of PWs 8 and 9 shows that they reached first and daughter reached later after the incident.

4. Ext.P1 is the wound certificate in respect of PW8. The cause of injury stated in Ext.P1 as follows:

"(son has caused bodily injury at 5 p.m.). Injury is a lacerated wound above eyebrow. Ext.P2 wound certificate shows that there was no external injury on the accused. Ext.P3 is the post-mortem certificate. The ante-mortem injuries shown in Ext.P3 are as follows:

> "1. Incised wound 23x4x6 cm on back of upper part of neck exposing the under-surface of surface of skull and vertebrae transversely oblique extending from 3 cm in front of upper part of left ear to the mid portion of right ear with a nick on the upper margin and corresponding notch on the lower margin 10.5 cm inner to its left end. The edges of the wounds were clean cut. The wound extended downwards and to the front cutting tissues, muscles, ligaments, vessels and back half of left ramus of mandible left mastoid process of skull bone chip fracture on the under surface of right occipital bone and reached upto the spinal cord through the space between skull and Ist cervical vertebrae. The covering of the spinal cord was cut underneath with a superficial cut on the spinal cord. The length of the wound at the depth was 13 cm. Left ear was cut through and through and right ear was cut through and through over at its inner half and the external

superficial incised wound extended upto the edge of ear back aspect, with contused edges.

Incised wound 10x4x4 cm outer and back aspect of left upper arm horizontal 6 cm below top of shoulder 10.5 cm outer to axillary fold. The muscles underneath was cut and the wound was directed downwards and inwards.

3. Incised wound 8x1.3 cm on back of Left palm horizontal just below proximal knuckle extending from middle to ring finger with fracture of proximal phalanges of middle and ring finger irregular and cut fracture of proxmal phalanx of little finger. The little finger was hanging on the skin at the front.

4. Incised wound 3.5 x0.7 cm bone deep oblique back of left thumb lower inner end 1.3cm above inner corner of nail bed.

5. Incised wound 12x2x2.5 cm oblique back of right chest. Inner lower end had tailing fro 4.5 cm downwards and to the Left reaching 3.5cm left to midline 20cm below top of chest. The wound was tissue deep and directed downward and to right finger.

6. Contused abrasion 4x2 cm on back of left chest 5cm outer to middle 6 cm top of shoulder."

The cause of death was stated to be injury no.1 that is a cut injury to upper part of neck.

5. The main defence of the accused is the plea of private defence. It is true that a plea of private defence need not be separately taken. It has to be inferred by the court on

the basis of the totality of the evidence in this case. In **Sekar v. State** [2002 (8) SCC 354] it was held by the Apex Court as follows:

> "It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the Court to consider such a plea. In a given case, the Court can consider it even if the accused has not taken it. If the same is available to be considered from the material on record."

Even though burden is on the accused to prove the plea of private defence the accused need not prove the same beyond reasonable doubt. In Rizan v. State of Chhattisgarh [2003)(2) SCC 661], after considering the various decisions, Apex Court held as follows:

> "Under Section 105 of the Indian Evidence Act, 1872, the burden of proof is on the accused, who sets off the plea of self-defence, and, in the absence of proof, it is not possible for the court to presume the truth of the plea of self-defence. The court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by electing necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused

discharging any burden. When the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record.....The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea."

6. The Apex Court in Krishnan v. State of Tamil Nadu (2006 AIR SCW 4185) held as follows:

"It is now well settled that the onus is on the accused to establish that his action was in exercise of the right of private defence. The plea can be established either by letting in defence evidence or from the prosecution evidence itself, but cannot be based on speculation or mere surmises. The accused need not take the plea explicitly. He can succeed in his plea if he is able to bring out from the evidence of the prosecution witnesses or other evidence that the apparent criminal act was committed by him in exercise of his right of private defence. He should make out circumstances that would have reasonably caused an apprehension in his mind that he would suffer death or grievous hurt if he does not exercise his right of private defence. There is a clear distinction between the nature of burden that is cast on an accused under section 105 of the Evidence Act (read with sections 96 to 106 of India Penal Code) to establish a plea of private defence and the burden that is cast on the prosecution under section 101 of the Evidence Act to prove its case. The burden on the accused is not as onerous as that which

> lies on the prosecution. While the prosecution is required to prove its case beyond a reasonable doubt, the accused can discharge his onus by establishing a preponderance of probability - [vide Partap v. State of U.P.(1976(1) SCC 757); Salim Zia v. State of U.P. (1979 (2) SCC 648); and Mohinder Pal Jolly v. State of Punjab (1979 (3) SCC 30]".

7. It is also settled law that while considering the defence whether accused has exceeded the right of private defence is also to be considered. Section 102 and 105 of IPC deals with the commencement and continuance of the right of private defence of body and property. The right commences, as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat to commit the offence, although the offence may not have been committed. The right commences so long as the reasonable apprehension of danger to the body continues but not beyond that as held by the Apex Court in Jai Dev v. State of Punjab (AIR 1962 SC 612). As held by the Apex Court in Buta Singh v. State of Punjab (AIR 1991 SC 1316) that a person who is apprehending death or bodily injury cannot weigh in golden scales in the spur of moment and in the heat of circumstances, the number of injuries required to be inflicted to escape from danger. The Supreme Court in Vidhya Singh v. State of M.P. [AIR 1971 SC 1857] held that the right of self-defence is a very

valuable right, giving a social purpose and shall not be construed narrowly. But it is equally true that it cannot be used as a retaliatory measure, when apprehension of defence no longer survives [See Naveen Chandra v. State of Uttaranchal, 2006 AIR SCW 6230].

8. In this case, admittedly, the incident took place first inside the house of the accused itself. The deceased came from Madras and went to the family house of PW8 and then immediately enquired about his brother and then he went to the house of the accused which is situated nearby. Father, PW8 also felt that there was something wrong in him and he also followed him and the incident occurred thereafter. The accused entered the house. So, it is clear that accused has trespassed into the house of deceased and PW8 followed him. Thereafter a fight might have occurred. It cannot be brushed aside the story of the accused that he was pushed down by the deceased and wife and father intervened. But the story of the accused that father, who was 68 years old at the time incident, caused injury to the deceased cannot be believed. From the totality of evidence, it can be safely stated that accused came from Madras and he trespassed into the house followed by PW8 and scuffle occurred.

Inspite of interference from PW8, the injuries were inflicted by the accused, deceased died. When deceased trespassed into his house and questioned him in an aggressive mood, it is natural that he felt danger to his life and life of his family It is also noted that PW8 father and other members of the family were enimical towards him either because of his demand in getting share of property from the father or his marriage or refusal by his wife in giving ornaments to PW10 sister. PW8 deposed that his wife PW9, mother of accused and sister PW10 did not attend the marriage of accused and never visited their house and PW8 was also injured by the accused in a previous occasion. Therefore, the evidence given PWs 8, 9 and 10 has to be analysed carefully. The motive mentioned in the charge was stated to be incorrect by PWs 8 and 9. According to PW8, the earlier incident of scuffle with PW8 took place six years ago. But, according to PW9, it took place only 2 months before the incident. But nothing regarding such incident was stated to the police by PWs 8 and 9. At the same time, it is clear that PWs 9 and 10 and children did not attend the marriage of the accused who was living nearby and they were not in good relationship. The fact that accused came along with friend from Madras as

mentioned by PW1 in cross-examination but what happened to the friend is not thereafter explained. But it is proved that the deceased followed by PW8 entered into the house of accused and fight occurred. At that time the accused apprehended fear to his life and family members cannot be stated to be improbable. But even if it is correct, the injuries seen on the deceased shows that he has exceeded his right of private defence. It is true that the accused did not sustain any grievous injury but that is not sufficient to discard a plea of private defence. It is not the injuries is on the accused that is more important but whether there is reasonable apprehension of danger to his life or life his family members. Considering the evidence in this case, we are of the opinion that accused has exceeded the right of private defence. His brother was inflicted with very serious injuries which are likely too cause death. Deceased went to the house of accused to question him and incident occurred. In the above circumstances, we are of the opinion that he can be convicted only under Section 304 Part-I IPC. Considering the very serious injuries inflicted on his brother, we are of the opinion that he should be imprisoned for a period of 8 years. Since he had already undergone imprisonment for two

years (sentence awarded by the trial judge for offence punishable under Section 324 IPC), which is ordered to be run concurrently, we are not considering the conviction of the accused under Section 324 IPC. Hence, we partly allow the appeal. We set aside the conviction under Section 302 IPC. Instead, he is convicted for offence under Section 304 Part-I IPC and sentence to undergo rigorous imprisonment for 8 years and fine of Rs.5000/-. In default of payment of fine, he shall also undergo further imprisonment for 3 months. He is entitled to the right of set off as provided under Section 428 Cr.P.C.

Appeal is partly allowed.

J.B. KOSHY, JUDGE.

K. HEMA, JUDGE.

Krs.

J.B. KOSHY & K. HEMA, JJ.

Crl. Appeal No.1478 of 2004

Dated this 10th day of December, 2007

JUDGMENT